

CONTRACTS--ISSUE OF BREACH BY PREVENTION.

The (*state number*) issue reads:

"Did the defendant breach the contract (by preventing the plaintiff from being able to perform the plaintiff's obligations)¹?"

(You will answer this issue only if you have answered the (*state number*)² issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the defendant knowingly [prevented] [hindered] [made more costly] the plaintiff's [performance of] [ability to abide by] a material term of the contract.³

(A material term is one that is essential to the transaction, that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material. A party's failure to [perform] [abide by] a term that is not material is not a breach of contract. In

¹Specify that the basis for breach is prevention when the jury is also instructed on breach by non-performance (N.C.P.I.--Civil 502.00) or by repudiation (N.C.P.I.--Civil 502.05).

²See N.C.P.I.--Civil 501.01 (Contracts--Issue of Formation).

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determining whether a term is material, you may consider the following factors:

[the subject matter and purpose of the contract]

[the intentions of the parties]

[the scope of performance reasonably expected by each party]

[the prior dealings of the parties]

[any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties knew or should have known of its existence]

[state other factors supported by evidence).

Second, that, at the time the defendant engaged in *his* conduct, the plaintiff was willing to perform *his* obligations as agreed and would have done so but for the conduct of the defendant.

In this case the plaintiff contends, and the defendant denies, that the defendant prevented the plaintiff from being able to perform *his* obligations [as follows] [in one or more of the following ways]: (*Give the plaintiff's contention(s) by*

³*Golaston Bros., Inc. v. Newkirk*, 233 N.C. 428, 432, 64 S.E.2d 424, 427 (1951); *Hayman v. Davis*, 182 N.C. 563, 565, 109 S.E. 554, 555 (1921); *McCurry v. Purgason*, 170 N.C. 463, 467, 87 S.E. 244, 246 (1915).

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identifying each material term which the defendant's conduct allegedly prevented the plaintiff from performing.)

The plaintiff further contends, and the defendant denies, that the plaintiff was willing to perform his obligations as agreed and would have done so but for the conduct of the defendant.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract (by preventing the plaintiff from being able to perform the plaintiff's obligations), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

